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NUMBER_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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FRANK R. SARGENT,
Petitioner,

vs.

MARSHALL S. MAYER,
Respondent.

++++++++++++

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

++++++++++++

FRANK R. SARGENT
Petitioner, pro se
41 B Street
Laurel, Maryland 20707
(301) 497-2742)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the standard of care in Professional Malpractice cases is determined by geographical boundaries.

2. Whether Plaintiff in Professional Malpractice action can prove his case with the testimony of Defendant.

3. Whether Trial Court's contradictory rulings on evidence and it's misstatement of factual matters in Judgement Memorandum sufficiently prejudiced the Petitioner to warrant the intervention of this Court.

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OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit was filed on or about February 26, 1982 in an unreported Memorandum. A copy of Memorandum is attached hereto as Appendix A. On or about April 20, 1982 the Court additionally denied Petitioners Motion for Rehearing and rejected Petitioners Suggestion for a rehearing En Banc. A copy of Order is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

This request for review arises from judgement against the petitioner in a legal malpractice action brought in the Federal District Court for Eastern California. Jurisdiction in that Court was based on diversity of citizenship between parties.

Because of the nature of the case certain information in the background of the underlying case is essential for proper understanding of issues sought to be reviewed.

In 1973 petitioner suffered a fire loss that resulted in an action against an insurance company in the Superior Court of San Francisco. The insurance company alleged certain 'contract defenses' in it's answer to that action. Subsequentally, in July of 1974 the insurance company filed an interpleader action in Shasta County Superior Court naming petitioner as one of several defendants. The interpleader action was for the alleged purpose of distributing insurance proceeds due and payable only to mortgage holders. Petitioner never made any claims to any part of the interpled funds. Petitioner retained herein respondent as legal counsel to represent him in the interpleader action and shortly thereafter respondent Mayer advised petitioner Sargent, by letter, that a stipulation by parties and the Shasta Court had been entered into whereby the aforementioned 'contract issues', joined for litigation in the San Francisco action, would not be litigated in the Shasta case. (A copy of said letter is attached hereto as Appendix D).

A judgement issued in the Shasta Court whereby the 'contract issues' were fully litigated and petitioner was nonsuited as to all claims against the insurance company.

Respondent Mayer advised petitioner that there was nothing appealable in the Shasta judgement and his service was terminated. Petitioner, financially unable at the time to retain other counsel, pursued an appeal 'pro se' to the California Fourth District Court of Appeal where, on July 27, 1979 an Order issued reversing the Shasta judgement on the grounds that it was improper to litigate 'contract issues' within the context of an interpleader proceeding.

On February 2, 1978 the petitioner, a Maryland resident, filed the action below in the Federal District Court for Eastern California, the Honorable Milton J. Schwartz presiding, alleging in the complaint Professional Malpractice and Fraud against the respondent and specifically alleging him to failed to keep his client properly informed as to issues involved in the litigation; informing his client that the 'contract issues' in the San Francisco case were protected when they were not; misinforming his client of the correct trial date (twice) and thereby prevented the appearance of important witnesses; and the central issue, that he had allowed his client to be subjected to years of unnecessary and expensive litigation that he could have aborted at any time before trial.

The case went to trial on October 7, 1980 before Judge Schwartz and a jury was empaneled at the morning session. Prior to commencement of trial petitioner submitted the deposition of his proposed expert witness, Gerald Kunes, a Maryland practicing attorney for twenty-five years.(The deposition had been taken "de bene esse" because the trial date had been reset three times and it was uncertain if the witness could be available when ultimately needed). The Court rejected the deposition on the grounds that it did not demonstrate that the witness was sufficiently familar with the underlying case and the standard of care involved therein. The Court made no mention of the fact that Mr. Kunes was a Maryland attorney. The petitioner as the plaintiff began his case by taking the stand for a short time to bring documents into evidence and he then called the respondent as defendant and adverse party as witness for the plaintiff. Preliminary matters had consumed all of October 7 and most of October 8. It was the afternoon session of the 8th when Mr. Mayer was called to the stand to testify. On the morning of October 9, pursuant to a motion by the defense, plaintiff's case was interrupted for the purpose of the

defendant's expert witness, Robert Sherwood, being allowed to testify out of turn and during the plaintiffs case solely as an accomodation to the witness. Mr. Sherwood revealed himself to be knowledgable, articulate and of the highest integrity.therefore, after a short period of testimony for the defense he was cross-examined by the petitioner for the rest of the day and the entire day of October 10.

On October 10 the Court ordered a recess in the trial for ten days until October 20 in order to schedule hearings on pending criminal matters that "could not wait". The trial resumed on October 20 and plaintiff's expert witness, Gerald Kunes, was submitted to voir dire examination by the Court and counsel.The Court refused to qualif the witness, after acknowledging him to be a "skilled and competent attorney", on the grounds, as stated by the Court, " When I say "sufficient familiarity", I mean sufficient familiarity with the standard of care in the Shasta County area during 1974 to 1976. Before you can express a professional expert opinion, you have to establish that familiarity."(Reporters Transcript 32:17). The Court then informed the plaintiff that "in the opinion of the Court" the issues were so fundamental as to not require expert testimony for their proof.(R,T. 27:3).

At this point the petitioner formally motioned the Court for an order that Mr. Mayer and Mr. Sherwood be deemed expert witnesses for the plaintiff's case. The Court granted the motion.(R.T. 29:5 and 30:15-25).The Court instructed petitioner to proceed with his case, whereupon, the examination of Mr. Mayer was completed and the petitioner took the stand again to give evidence on damages. He then rested his case, the only witnesses to have testified being the plaintiff, Mr. Mayer the defendant and Mr. Sherwood. The testimony on cross-examination of Mr. Sherwood consumed two full days and that of Mr. Mayer one day.

The defense moved for a Directed Verdict on the grounds that no expert testimony had been offered tending to prove the defendant to have failed to meet the standard of care and that his actions had damaged the plaintiff. The Court granted the defendant's motion. The Court made no written findings pursuant to judgement, however, it issued a Memorandum and Order in ruling on petitioners Motion for New Trial.(A copy of said Memorandum and Order is attached hereto as Appendix C.).

REASONS FOR GRANTING THE WRIT

FIRST QUESTION

THE MINIMUM STANDARD OF CARE IN PROFESSIONAL MALPRACTICE ACTIONS IS NOT SUBJECT TO DIFFERENT INTREPRETATIONS BASED ON GEOGRAPHICAL LOCATION OF PRACTICE.

The trial court disqualified petitioner proffered expert witness, an attorney of twenty-five years practice in Maryland and other jurisdictions, on the grounds,(The Court)" I CANNOT PERMIT A WITNESS WHO DOES NOT HAVE SPECIALIZED TRAINING AND EXPERIENCE WITH CALIFORNIA LAW AND PROCEDURE TO EXPRESS AN OPINION OF THE PROPRIETY OF THE DEFENDANT'S CONDUCT"(R.T.28:21) and,"WHEN I SAY 'SUFFICIENT FAMILIARITY' I MEAN ALSO SUFFICIENT FAMILIARITY WITH THE STANDARD OF CARE IN SHASTA COUNTY AREA DURING 1974 TO 1976. BEFORE YOU CAN EXPRESS A PROFESSIONAL EXPERT OPINION, YOU HAVE TO ESTABLISH THAT FAMILIARITY. THAT WAS THE ONLY REASON FOR MY---AND PURELY A TECHNICAL ONE--- FOR REFUSING TO QUALIFY HIM TO EXPRESS THAT OPINION"(R.T. 32:19).

The ruling of the trial court was improper in the light of controlling law (infra) and the Ninth Circuit Court of Appeals' refusal to address the issue and reverse the trial court places the circuit court in conflict with state courts in other juris-

dictions as well as the FIFTH CIRCUIT COURT OF APPEALS in GLEASON VS. TITLE GUARANTEE CO. (300 F.2d 813, 814 (5th Cir. 1962) rehearing denied 317 F.2d 56 (5th Cir. 1963).

To address the question within the context of the case at bar the reviewing court should recognize that the central issues in the trial court were that respondent failed in his duty to keep his client properly informed as to issues involved and that he allowed his client to be subjected to years of unnecessary and expensive litigation in an improper legal action that could have been terminated at any stage of the proceedings before trial and judgement by implementing available procedures. Specifically, the respondent was charged with failure to properly prepare and timely file discovery pleadings; that he, by letters, misinformed his client as to issues to be litigated; that he misinformed his client as to the seriousness and danger of the litigation; that he (twice) misinformed his client of the true trial date and thereby prevented the appearance of important witnesses; and, that he advised his client to not oppose a foreclosure that resulted in the loss of his client's business property. (Letters attached as Appendix D).

It was also charged that respondent informed his client that his case against an insurance company was fully protected in the proceedings when in fact it was in grave jeopardy and that, at time of trial and without the knowledge or consent of his client, the respondent waived a stipulation designed specifically for the protection of his clients rights.

The trial court's ruling gives rise to a presumption that local custom or practice may allow for a lower standard of care than is generally recognized by the profession. Such a presumption is without foundation, as pointed out in the Fifth Circuit case GLEASON (supra) where the court reasoned that local practices may enlighten the court as to local customs but cannot be used to lower the standard of care. RESTATEMENT, SECOND, TORTS § 295 A. CUSTOM, addresses the issue and suggests that the "reasonable man" standard should apply. Another presumption would be that a different kind of law (or medicine, or engineering, etc.) is practiced in each local area. Law, like medicine, is taught and practiced fundamentally the same in every area of the country. The only difference would be, in law, perhaps a different app-

roach to local rules and procedure, and a knowledge of these local vagaries may be gained quite easily by conscientious experts. The basic standard would be entirely unaffected. Modern trends are to eleminate any reference to geographical confines as a measure of the standard of care. The State of New Hampshire has, by statute, abrogated local deviations, as follows:

> N.H.REV. STAT. ANN.§ 508.13(1975 Supp.) PROFESSIONAL MALPRACTICE; EVIDENCE.
>
> IN DETERMINING WHETHER THE PERSON AGAINST WHOM A MALPRACTICE CLAIM HAS BEEN MADE HAS MET THE APPLICABLE STANDARD OF CARE, THE JURY OR JUDGE SHALL NOT BE BOUND BY THE STANDARD OF CARE ACCEPTED OR ESTABLISHED WITH RESPECT TO ANY PARTICULAR GEOGRAPHICAL AREA OR LOCALITY, BUT SHALL CONSIDER ONLY WHETHER THE PERSON AGAINST WHOM THE CLAIM HAS BEEN MADE HAS ACTED WITH DUE CARE HAVING IN MIND THE STANDARDS AND RECOMENDED PRACTICES AND PROCEDURES OF HIS PROFESSION, AND THE TRAINING, EXPERIENCE AND PROFESSIONAL DEGREE OF SKILL OF THE AVERAGE PRACTICIONER OF SUCH PROFESSION, AND ALL OTHER RELEVANT CIRCUMSTANCES.

Case law in support of uniform stand-

ards of care is supported by BERMAN VS. RUBIN (227 S.E.2d. 802), CARBONE VS. WARBURTON (1953)(11 N.J. 418), HOLMGREN VS. MASSEY FERGUSON INC. (1975)(516 F.2d. 856), TRANSAMERICAN INS. VS. KEOWYN(451 F. SUPP. 397) and STEWART VS. SBARRO (142 N.J.S.C. 581).

Authority for "same or similar locality" is mere dicta.Respondent herein cited SMITH VS. LEWIS (1975)(47 C.A.3d 802)on the issue at trial, however, in SMITH "locality" was not at issue and the reference was only surplusage unnecessarily included in a jury instruction.

The dictum "same or similar locality", however,appears as a liberal latitude when compared to the court's limitations imposed in this case. While the Court mentioned the State of California it emphatically laid down " sufficient familiarity with the standard of care in the Shasta County area during 1974 to 1976"(R.T. 32:17-22), to meet the Court's requirements of an expert. This ruling can be construed as impossible to meet by any plaintiff in malpractice. Considering the limited time and geographical area only attorneys practicing at the time in Shasta could meet the test, and considering the interrelationships of such a legal community, no lawyer could be expected to commit "professional suicide" by testifying. The Court was wrong in setting such an impossible test and petitioner is due a new trial.

THE NINTH CIRCUIT COURT OF APPEALS FAILED TO APPLY CONTROLLING STATE LAW TO THE ISSUE OF WHETHER A PLAINTIFF IN A MALPRACTICE ACTION CAN PROVE HIS CASE BY THE TESTIMONY OF DEFENDANT.

The Appellate Court misconstrued the issues raised while citing TRAVERS VS. MESHRIY (627 F.2d. 934, 939-940, 9th Cir. 1980), a case in point to a failure of substantial evidence, however, the substance of the evidence was not before the Court for review.

The exact wording of respondent's Motion for Directed Verdict, made at close of petitioners case as required by F.R.Civ.P-50 (a), is set forth in reporter's transcript at 37:17-25, however, a clear understanding of the exact nature of petitioner's motion and the Court's ruling is set forth in Memorandum and Order issued at time of denial of Motion for New Trial. (Memorandum and Order attached as app. C .) The Court described the procedure, as follows;

(AT THE CLOSE OF PLAINTIFF'S CASE DEFENDANT MOVED FOR A DIRECTED VERDICT UNDER F.R.CIV.P. §50(a), CON-

TENDING THAT THERE WAS NO COMPETENT EVIDENCE OF LIABILITY, AND THEREFORE NO ISSUE OF FACT TO BE SUBMITTED TO THE JURY, BECAUSE THERE WAS NO EXPERT TESTIMONY TENDING TO PROVE (1) THAT DEFENDANT'S CONDUCT FELL BELOW THE APPLICABLE STANDARD OF CARE, OR (2) THAT ANY ALLEGED NEGLIGENCE OF DEFENDANT WAS A PROXIMATE CAUSE OF DAMAGES TO PLAINTIFF. (emphasis in orig.)

The Order makes it clear that the contentions of the respondent was that the evidence was not competent solely because of no expert testimony, and the Court granted the motion as stated. The petitioner now must prove only that his case was in fact made on expert testimony to point up the error of the trial court. The Court is requested to consider the record, as follows:

MR. SARGENT: YOUR HONOR, REGARDLESS OF THE COURT'S RULING THAT THE PROBABILITY OF AN EXPERT WITNESS IS NOT REQUIRED IN THIS CASE, I WOULD MOTION THE COURT FOR A FINDING AT THIS TIME THAT THE PLAINTIFF'S CASE HAS IN FACT BEEN PREDICATED UPON EXPERT TESTIMONY, THAT BEING THE TESTIMONY OF MR. MAYER AND MR. SHERWOOD, BOTH BEING DEEMED EXPERTS. (R.T. 29:5-10)

and,

THE COURT: WHAT IS IT YOU WANT TO MOVE AT THIS TIME?

MR. SARGENT: WELL, I WAS CONTEMPLATING MEETING THE LEGAL REQUIREMENTS THAT THE CASE BE PREDICATED UPON EXPERT TESTIMONY, AND I WAS SUBMITTING THAT THE TESTIMONY OF THE TWO EXPERTS THAT HAVE PREVIOUSLY TESTIFIED, MR. MAYER AND MR. SHERWOOD, WOULD SERVE TO MEET THAT NEED OF THE PLAINTIFF.

THE COURT: YOU ARE ABSOLUTELY CORRECT IT DOESN'T MATTER WHO PRODUCES THE WITNESS IF THE WITNESS' TESTIMONY ESTABLISHES THAT THE STANDARD OF CARE HAS NOT BEEN MET, THE FACT THAT THE WITNESSES WERE CALLED---WELL YOU CALLED MR. MAYER, BUT IT DOESN'T MATTER WHETHER YOU CALLED HIM UNDER CROSS-EXAMINATION OR UNDER DIRECT EXAMINATION,---.(R.T. 30:15-25)

The record shows there to have been only three witnesses to testify. The petitioner, who by law is entitled to every presumption,(BUSINESS DEVELOPEMENT CORP. OF N.C. VS. U.S.,C.A.N.C. 1970, 428 F.2d.451, Cert. Denied 91 S.CT. 355, 400 U.S.957.), along with the respondent Mayer and his expert witness Mr. Sherwood both of whom had been deemed experts for plaintiff. (R.T. 29:5). Controlling law on the issue is clear as set forth in LAWLESS VS. CALA-

WAY (24 Cal.2d. 81), where the Court stated that a plaintiff in a malpractice case can prove any number of material facts, or the whole case, by testimony of the defendant.

Because of the foregoing factual circumstances regarding the evidence established at trial the petitioner submits that the trial court usurped the province of the jury by taking competent and sufficient evidence from the jury and directing a verdict for the respondent. The petitioner was deprived of his rights to due process and should be allowed a new trial.

THE TRIAL COURT'S CONTRADICTORY RULINGS ON EVIDENCE MISLED THE PETITIONER AT TRIAL AND IT'S DISTORTION OF TRIAL RECORD LED THE CIRCUIT COURT OF APPEALS TO ERRONEOUS CONCLUSSIONS.

The supervisory powers of this Court is necessary to restore equity in the proceedings below and in order for the Court to understand the issues involved a recognition of the true chronological sequence of events at trial is necessary. The record shows the true sequence, as follows;

The trial convened on October 7, 1980 and a jury was empaneled on that day. The petititioner, as plaintiff, offered the deposition of his expert witness Gerald Kunes, a Maryland attorney in practice for some twenty-five years. The deposition had been taken "de bene esse" because the trial date had been repeatedly changed and it was uncertain if the witness could appear when ultimately needed. The Court refused the deposition on technical grounds but did not mention the fact that the proposed expert witness was from Maryland.

Petitioner took the stand for a short time to admit documents into evidence. He then called the respondent Mayer to testify as defendant for plaintiff's case. Mr.

Mayer was on the stand during the afternoon session of October 8th and his testimony was interrupted at the beginning of the morning session on October 9th to permit expert witness for the defense, Mr. Sherwood, to testify , out of turn, during the plaintiffs case. After the witness testified for the defense petitioner cross-examined him for the rest of the day and the entire day of October 10th. The Court declared a recess in the trial from October 10th to October 20th to accommodate criminal matters on the calendar the Court said "could not wait."

Trial resumed on October 20th and Mr. Kunes, expert witness for the plaintiff, was called to be qualified. The Court rejected the witness because he did not practice "within the geographical limits of the State of California", as is fully set forth in the first question in this petition.The Court, in the light of it's reason for disqualifying the witness, knew or should have known at the time of rejecting deposition of Mr. Kunes that it would not, in any event, qualify a Maryland attorney as an expert. It owed a duty to the plaintiff to so inform him at the time in order that he could avail himself of the ten day recess in the trial to find an expert that the Court would accept. The prejudice suffered by the petitioner cost him his case.

Upon disqualification of Mr. Kunes the Court proceeded to mislead the petitioner by engaging in an extended discussion of the theory of the case and stating that "in the opinion of the Court" the issues in the case did not require expert testimony for proof. (R.T. 27:3-16) The Court closed the issue, as follows;

> THE COURT:ALL I'M SUGGESTING TO YOU IS THAT IF YOU ESTABLISH BY THE EVIDENCE THAT YOUR LAWYER DIDN'T TELL YOU WHAT THE FACTS OF THE CASE WERE AND WHAT THE ISSUES WERE GOING TO BE, AND THAT YOU WENT INTO TRIAL UNPREPARED WHERE YOU COULD HAVE PRODUCED EVIDENCE, I DON'T THINK YOU NEED AN EXPERT WITNESS.(R.T. 32:5-9).

Regardless of the Court's ruling that the case did not require expert testimony petitioner went to extraordinary lengths to establish that his case was being made on the testimony of the respondent Mayer and his expert witness Sherwood, as outlined in detail in question two herein.

The substance of the evidence, which may or may not be in question here, was made on over one hundred documents that Mayer and his expert were interrogated on for a period of three full days. An example of the conclusiveness of evid-

ence admitted to support plaintiff's case can be seen from an examination of three (3) letters from respondent to petitioner while his legal counsel. The letters are attached hereto as Appendix and the first states that issues in suit against insurance company cannot be tried in the Shasta County, when in fact they were the only issues tried. The second letter was sent to petitioner immediately before the Shasta trial and it advises petitioner that there is nothing to worry about, when in fact the judgement that issued non-suited the petitioner in his action against the insurance company, and the last letter advises petitioner to not oppose pending foreclosure proceedings when the ultimate result was that the petitioner lost his business property.

Petitioner concluded his case on October 21 by taking the stand and testifying on the issue of damages. He then rested his case. Defense moved for a directed verdict and the Court granted the motion. The Court made no written findings pursuant to judgement, however, at disposition of Motion for New Trial a Memorandum and Order was filed. (Memorandum and Order att. as App. C).

The Trial Court's Memorandum and Order establishes with finality that the respondent's Motion for Directed Verdict and the Court's granting of that motion did not go to the substance of the evidence at trial, only that said evidence purportedly had not been established by expert testimony.

The Memorandum and Order goes on to recite an alleged sequence of events that, if true, would justify the Court's findings, however, the recitation is a distortion of the true record as set forth in this petition. First, the Court denies ever assuring the petitioner that he did not need an expert witness for the proof of his case. Prior citations to the record herein respond to that allegation. The Court then describes an alleged sequence of events at trial and makes a statement of facts contrary to the true record. The Court states that it granted petitioner additional time to produce his expert witness at trial and that this required a re-ordering of the proof in the case by the testimony of respondent's expert witness, out of turn, and during the plaintiff's case.

The facts are that petitioner never requested, nor was given, any additional time for any reason, and the ten days

recess in the trial was ordered by the Court because of the Court's own scheduling problems with criminal matters that must be heard. (R.T.14:21 and 18:8-15). As to the reordering of proof being the petitioners fault, the record is, as follows;

> THE COURT: LADIES AND GENTLEMEN, ALTHOUGH THE PLAINTIFF HAS NOT CONCLUDED HIS CASE, THE ORDINARY ORDER OF PROOF AT TRIAL IS PLAINTIFF PUTS ON ALL HIS CASE, THEN THE DEFENDANT STARTS THE DEFENSE, IN THIS CASE, IN ORDER TO ACCOMMODATE A WITNESS, COUNSEL HAVE AGREED AND THE COURT HAS AGREED THAT A DEFENSE WITNESS MAY BE PUT ON TODAY OUT OF ORDER, ACTUALLY, DURING THE PLAINTIFF'S CASE,(R.T. 12:2-11).

The Memorandum goes on to juxtapose events at trial in a manner inconsistent with the record, but if taken to be the true order, it would tend to justify the Court's actions. The Memorandum and Order does not address the question of Mayer and Sherwoods testimony, in fact the Court proceeds as if no such testimony was ever made and denied petitioner's Motion for New Trial.

Petitioner suggests the Trial Court's Memorandum and Order were taken at face value by the Ninth Circuit Court of

Appeals and thereby a gross miscarrage of justice was perpetuated. This Court Should impose it's supervisory powers to rectify the inequities created and grant the petitioner a reversal of the judgement or, alternatively, a new trial.

CONCLUSION

For the reasons set forth herein the Petitioner respectfully submits that a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK R. SARGENT,
Petitioner pro se

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed on this date , postage prepaid, to the parties as named below.

Frank R. Sargent
Petitioner pro se

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Filed Feb. 26, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK R. SARGENT, Plaintiff-Appellant vs. MARSHALL S. MAYER, Defendant-Appellee.	No. 81-4020 D.C. No. Cv-S-78-50 MEMORANDUM

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
HONORABLE MILTON L. SCHWARTZ, DISTRICT JUDGE PRESIDING-ARGUED AND SUBMITTED FEB. 12, 1982
BEFORE:Farris, Ferguson and Nelson Cir.Judges

Plaintiff-appellant, Frank R. Sargent (Sargent), appeals to this court from the denial of his motion for summary judgement and from a directed verdict entered for the defendant-appellee, Marshall S. Mayer(Mayer).

Sargent contends that Mayer did not comply with procedural requirements in opposing his motion for summary judgement and therefore the motion should have been granted in his favor under FRCiv P 56(c). His contention need not be reached because even when no evidence is presented in opposition to the motion, summary judgement should not be granted if evidence in support of the motion

is insufficient. Hoover v. Switlik Parachute Co. 663 F.2d. 964, 967 (9th Cir. 1981). For the reasons stated by the district judge, the evidence presented in support of the motion for summary judgement was insufficient.

In reviewing the granting of a motion for directed verdict on appeal the test is: viewing the evidence as a whole, and in the light most favorable to the nonmovant, whether there is substantial evidence present that could support a finding, by reasonable jurors for the non-moving party. Travers v. Meshriy, 627 F.2d 934, 939-940 (9th Cir.1980) Substantial evidence was not presented here. The directed verdict was granted based on Sargent's failure to produce the expert testimony necessary to establish his prima facia case of attorney malpractice. The transcript of the trial court reveals a vigorous attempt by the trial judge to help Sargent, who appeared in propria persona, understand applicable California law and it's requirements for the proper presentation of his case of attorney malpractice. The arguments presented by Sargent on appeal are founded on a misunderstanding of the applicable law, misintrepretation of the trial court's holdings, and evidence unsupported by the record.

Sargent provides no basis for a reversal of the denial of his motion for summary judgement or the grant of defendant's motion for a directed verdict. Therefore, the district court's decision is affirmed.

Filed 4-20-82

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK R. SARGENT, Plaintiff-appellant, vs. MARSHALL S. MAYER, Defendant-Appellee.	No. 81-4020 D.C.No.Civ-S-78-50 ORDER

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
BEFORE: FARRIS, FERGUSON & NELSON Cir.Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris, Ferguson and Nelson have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

FRANK R. SARGENT, Plaintiff, vs. MARSHALL Y. MAYER, Defendant.	CIV.NO.S-78-50-MLS

MEMORANDUM AND ORDER

This case was tried to a jury, commencing October 7, 1980, with Plaintiff, Frank R. Sargent, appearing in propria persona. Defendant was represented by Douglas E. Newlan of Barr, Minoletti & Newlan.

At the close of plaintiff's case, defendant moved for a directed verdict under FRCivP § 50 (a), contending that there was no competent evidence of liability, and therefore no issue of fact to be submitted to the jury, because there was no expert testimony tending to prove (1) that defendant's conduct fell below the applicable standard of care, or (2) that any alleged negligence of defendant was a proximate cause of damage to plaintiff. Defendant submitted a memorandum of points and

authorities in support of his motion, and the motion was thereafter orally argued by both sides, following which the court, on October 21, 1980, granted defendant's motion for directed verdict.

On November 10, 1980, plaintiff filed a written notice of motion and motion for an order granting a new trial, accompanied by a combined declaration-memorandum of points and authorities. The motion was argued orally on December 19, 1980, and submitted.

Judgement for defendant, pursuant to the order granting motion for directed verdict, was entered on November 21, 1980.

The court has examined the various assignments of error asserted by plaintiff and concludes that there is only one ground which merits serious consideration, namely, plaintiff's contention that he was misled by the court into beleiving that he could legally prove his case, to the point where it could be submitted to the jury, without establishing by expert testimony the elements of negligence and proximate cause.

Plaintiff has complied with the technical requirements of FRCivP § 59. The motion was made in writing and served within ten days after the entry of judgement; in fact, it was made prior to entry, but

the law is clear that this does not render the motion premature so long as it was made after announcement of the court's decision. The ground for the motion are stated therein with reasonable clarity and particularity, keeping in mind that the plaintiff is not represented by counsel. Finally, the ground which the court considers worthy of consideration is one which is recognized by Rule 59 (and the prior case law which it incorporates) and which can be characterized under the general heading of " improper comments by the trial judge."

The court has carefully examined the recordand the trial transcript in an effort to determine whether any comments made by the court could reasonably have misled plaintiff into believing that it was unnecessary for him to obtain the services of a properly qualified expert witness to testify on the issues of negligence and proximate cause, and has concluded that the only statements which could remotely be claimed to have misled him are the following remarks which were made by the court in connection with it's ruling that the Maryland attorney proffered by plaintiff as his expert witness was not qualified to testify as an expert on California law practice and procedure in the Shasta County area:

"Well, Mr. Sargent, after cutting you off from your initial statement to me this morning if you think this is a matter that could be decided by non-expert witnesses, I have come around full cycle to thinking that maybe you are right. As I understand the witness, as well as your position, he's saying that Mr. Mayer failed to tell you certain things, and if he had told you those things, then you could have---you would have done other things. That doesn't need an expert witness. I agree with you that hypothetically it doesn't take any specialized standard of care to know that a lawyer is required to keep his client advised where the client needs to make decisions and where decisions have to be made on the defense of his case. I don't think it calls for expert testimony, if that's the basis."

Rptr. Transcript of trial proceedings Monday, October 20, 1980 at 10:05 a.m.

The difficulty, however, with plaintiff's argument is that these comments must be viewed in the chronological sequence in which they were made. To begin with, plaintiff first offered the expert testimony of the Maryland attorney, Mr. Kunes, by way

of his deposition. The court sustained the objection to such deposition testimony on the ground that the questions on voir dire examination of Mr. Kunes at the deposition failed to establish whether he was or was not qualified as an expert on the subjects about which he testified. The court, therefore, granted additional time to plaintiff to arrange for Mr. Kunes presence at the trial on a later date, which, in turn, required a re-ordering of the proof and resulted in defense testimony being introduced outof order, with Mr. Kunes thereafter being called as part of plaintiff's case in chief after the introduction of certain defense testimony.

When Mr. Kunes finally appeared in court he was questioned extensively, out of the presence of the jury, on his qualifications, with the court assisting plaintiff in this voir dire examination. At the conclussion of the questioning, and still outside the presence of the jury, the court ruled that the witness could not qualify as an expert in the areas about which he proposed to testify, and in connection with the announcement of such ruling the court made the above quoted remarks.

Plaintiff contends that when the court made it's ruling precluding the introduction of Mr. Kunes testimony, plaintiff would have

then sought the services of a properly qualified expert on California law and procedure but was misled by the court into believing that such expert testimony was not necessary. Assuming that plaintiff was in fact so misled, he fails to explain (1) where he would have located such an expert witness, and (2) how any such witness could have been expected to review and analyze an extensive, complex background file so as to be prepared to testify, without a substantial continuance of the trial---which the court would not have granted in light of the fact that the jury had been in attendance since October 7, 1980, with one interruption already, between October 10 and October 20.

The court concludes, therefore, that even if it had not made the remarks quoted above, and if plaintiff, on October 20, 1980, had requested a continuance to permit him t o seek to obtain an expert witness, the court would have denied such request as untimely and would have required plaintiff to proceed with the balance of his case at that time, which would have produced the same result as actually obtained. The fact that plaintiff might have been able to find a properly qualified expert witness who would testify to facts sufficient to discharge

plaintiff's burden of proof, or at least sufficient to permit the case to go to the jury, is entirely speculative and would not have warranted a substantial interruption of the trial in order to permit plaintiff to conduct his search at that late date.

In light of the foregoing, the court concludes that plaintiff suffered no prejudice by reason of what he classifies as improper or misleading comments by the court, and therefore the court DENIES PLAINTIFF'S MOTION FOR A NEW TRIAL.

DATED: December 30, 1980

/S/ Milton L. Schwartz
UNITED STATES DISTRICT JUDGE

APPENDIX D

May 30, 1974

Mr. Frank R. Sargent
200 Main Street
Laurel, Md. 20810

re:Sargent v. Patel

Dear Frank,

This case appears to be directly on point and it is my feeling that we should do nothing at this point to further preclude the holder of the Trust Deed which is in default from foreclosing.

Please give me any thoughts that you may have.

Sincerely,

/S/ Marshall S. Mayer

(Plaintiff's exhibit #17, 5-9-78)

August 11, 1975

Mr. Frank R. Sargent
Tax Accountant
200 Main Street
Laurel, Md. 02810

Dear Frank,

DepartmentIII of the Superior Court, Honorable Clyde Small presiding held a pre-trial conference August 8, 1975 in the inter-pleader action filed by Great American Insurance Company. The conference lasted three hours and wound up probally more confusion than clarity, as to what the issues are.

This case is going to be tried, at least in court on October 31, 1975. It will not be necessary for you to be personally present since all questions involved are legal issues. There is no factual dispute as to the fact of the insurance, the amount available under the terms of the policy and who the loss payees are under the policy.

The principal problems that are now present involve the fact that at the time of the loss Gigraltar Savings and Loan had a policy in effect with the Hartford company and this may or may not be available as an offset. In addition, the fact that the United ates Government is involved since they are interested in any proceeds you may have, appears to have a beneficial effect. In fact, It may be possible that the Corradettis will offer to settle with Federal government to remove them from the case, since the Federal Governments rights to get at the proceeds may be greater than any of the other parties under the terms of Federal Law. If the Federal Government were to receive funds from the Corradettis this would reduce your tax liability, which I am sure would be of benefit to you.

(plaintiff's exhibit no. 70 S-78-50)

I have made sure that the issues involved in your lawsuit against Great American in San Francisco will not be adversly affected by any proceedings that we take here in Shasta County. I think that it would be advisable for you to move that matter along because at the present time I understand that the attorney for Mr. Sweigle has intervened and if you fail to take action he can move the matter without your consent.

If you have any questions please drop me a line.

Sincerely,

/S/Marshall S. Mayer

Office-Supreme Court
FILED
AUG 16 1982
ALEXANDER L. STEVAS
CLERK

No. 82-90

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

FRANK R. SARGENT,
Petitioner,

VS.

MARSHALL S. MAYER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent
Marshall S. Mayer

Dated: August 16, 1982

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Did the Court of Appeals err when, after reviewing the record, it concluded that despite the District Court's vigorous attempts to assist Petitioner in presenting his case at the trial below, Petitioner failed to present sufficient evidence to support a verdict in his favor in a diversity action for legal malpractice under applicable California law?

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. The Facts Below

The critical facts underlying this litigation are set forth in the decision of the California Court of Appeal in *Great American Ins. Co. v. Sargent*, 3 Civ. 17097 (Cal. Court of Appeal, 3d Dist., July 27, 1979). This Court is respectfully requested, under Rule 201 of the Federal Rules of Evidence, to take judicial notice of the facts set forth in that decision, a copy of which (hereafter referred to as "Opinion") is attached as Appendix A.

Petitioner's primary underlying claim concerns the manner in which his former attorney, Respondent Mayer, handled a complicated interpleader action under California

statutory law. In particular, Petitioner asserts that certain claims by the insurer of his real property were wrongfully litigated in the state interpleader action, with the result that the interpleader court found that Petitioner had operated his restaurant wilfully and knowingly in a manner which increased hazards, that he committed fraud in his proof of loss submitted to the insurance company, that he failed to safeguard the property after the fire, that he failed to submit to an examination under oath pursuant to provisions of the policy, and that he was in material breach of the insurance policy and had forfeited his rights thereunder. (Opinion at 5.)

The California Court of Appeal specifically noted that the *state interpleader court* erred when it insisted (over Respondent's formal objection) that the insurer's claims be litigated in the interpleader action. (Opinion at 4-5, 10-11.) The California appellate court affirmed the judgment of the state interpleader court, but remanded the case with directions to enter new findings of fact and conclusions of law in which no reference was made to any breach of the insurance contract by Petitioner. (Opinion at 12.) Petitioner was thus free to litigate the issue in another forum.

B. The Proceedings Below*

Petitioner's federal diversity action against Respondent for professional malpractice was tried before a jury. Expert witnesses had been disclosed by each side prior to the

*As used hereafter, "CR" shall refer to Petitioner's Designated Excerpts From the Record below and to the trial briefs submitted by the parties (which briefs were cross-designated by Respondent in the Court of Appeals); "RT" shall refer to the Reporter's Transcript. Respondent, on August 3, 1982, requested certification and transmittal to this Court of the Petitioner's Designated Excerpts From the Record; Petitioner on July 16, 1982, requested certification and transmittal of the Reporter's Transcript.

trial. (CR 74:23-31; Petitioner's Trial Memorandum; Respondent's Trial Memorandum.)

At trial, Petitioner sought to introduce the deposition testimony of his expert witness. The District Judge denied that request because the purported expert had not been shown in the deposition to be qualified. (RT 7:17-10:16.) The court allowed Petitioner to present his witness for live voir dire (with the court's assistance) concerning his qualifications. (RT 18:8-19:10; CR 104:28-30.) The District Judge found that the witness was not competent to express an opinion as to the standard of care applicable to a technical area of the law founded upon California statutory procedure. (RT 27:17-28:24; 32:12-23.)

The District Court ultimately granted Respondent's motion for directed verdict, because (1) Petitioner had failed to produce expert testimony tending to establish the standard-of-care and proximate-cause elements of the malpractice action; and (2) there was no competent evidence before the court tending to prove these elements. (CR 92; RT 55:13-58:6.) Petitioner's motion for a new trial was denied.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. The appeal was briefed and argued on a record designated solely by Petitioner. After reviewing Petitioner's record and the briefs submitted by the parties, and after hearing oral argument, the Court of Appeals concluded that the District Judge had attempted vigorously to assist Petitioner in presenting his case and that Petitioner had failed nevertheless to produce substantial evidence to support his cause.

REASONS FOR DENYING THE WRIT

Petitioner has received the assistance of two courts, neither of which has found merit in Petitioner's claims. The instant Petition raises no colorable constitutional issues, highlights no decisional conflicts requiring resolution by this Court, concerns state law only, and presents no otherwise significant issues appropriate for review here. Accordingly, the Petition should be denied.

Petitioner clearly understood that expert testimony is required (except as to matters of common knowledge) both to establish the standard of care to which an attorney must adhere, and to show that the result achieved would have been different but for the attorney's breach of the standard of care. (E.g., Pre-Trial Order dated Feb. 26, 1980 (CR 72-77); Petitioner's Trial Memorandum; *Kirsch v. Duryea*, 21 Cal.3d 303, 146 Cal.Rptr. 218 (1978); *Lipscomb v. Krause*, 87 Cal.App.3d 970, 151 Cal.Rptr. 465 (1978).) The record chosen by Petitioner reflects that the District Court went to great lengths to explain the rule to Petitioner, assist Petitioner in establishing the qualifications of his expert witness, and even aid Petitioner in presenting his case. (E.g., RT 29:13-24; 31:21-32:4; 25:1-26:6.) The District Judge's efforts were noted by the Ninth Circuit Court of Appeals, following its review of the trial transcript. (Petitioner's Appendix A, at 2a.)

Petitioner's record further demonstrates that the District Court properly concluded that Petitioner failed to demonstrate (by way of expert testimony or otherwise) how Respondent's conduct, even that for which expert testimony arguably might not have been required in order to estab-

lish the standard of care, affected the outcome in the state interpleader court. The District Judge explained as follows:

> "What the Court is having great difficulty with in seeing your position, Mr. Sargent, is that you *assume* you get over the first hurdle that the Court could or the jury could say I don't need any expert to tell me that the standard of care has been violated. He forgot, he simply without excuse or reason forgot to do something that everybody knows he should have done. That's only step number one. Step number two is, if he had done the thing which we all agree he should have done, is there a reasonable likelihood or probability that the result in the trial court would have been different. You are really asking me to say it would have been different. I can't supply the evidence for you, you have to establish that for the jury, and a lay person is really not competent to express an opinion that the results would have been different if the lawyer had done it a different way.
>
> "I might say for whatever it may be to anybody in the case, after reviewing the transcript of the underlying case in Shasta County, I found it to present enormously complex legal and factual issues. There were a great mass of pleadings for a trial that lasted two days. There are three volumes, three substantial volumes of the clerk's transcript with all types of pleadings, memoranda of points and authorities and briefs. It was obvious that the trial court disagreed with counsel, did not see counsel's position on the case." (RT 55:13-56:11; emphasis added.)
>
> . . . .
>
> "I agree with you that if the trier of fact accepts your testimony that you were misinformed of the trial date and showed up on the wrong date, and also if the

trier of fact believes that you were falsely or erroneously told that all of the issues in the San Francisco case were adequately protected and they weren't, *maybe* you wouldn't need expert testimony to say that violates the standard of care. *But you still need expert testimony for the next step,* and that is, if he had done it exactly the way you, Mr. Sargent, claimed he should have done it, is there any evidence before the Court, any competent evidence that the result in the trial court would have been different; is there any evidence before the Court that if Mr. Mayer had proceeded, as you say, vigorously and properly, he could have gotten the case dismissed?

"There is no such competent evidence before the Court, . . ." (RT 57:12-58:1; emphasis added.)

The District Court did not abuse its discretion in holding that the expert was not qualified to testify with regard to the standard-of-care or proximate-cause issues in the case. Under both federal and state law, a ruling as to the qualification of an expert witness is within the sound discretion of the trial court and will be overturned only where "clear abuse" is shown. (Rule 104, Federal Rules of Evidence, and Advisory Committee notes to subdivision (a) thereof; *e.g., Reno-West Coast Distribution Co. v. Mead Corp.,* 613 F.2d 722, 726 (9th Cir. 1979), *cert. denied,* 444 U.S. 927, 100 S.Ct. 267 (1979). Sections 405 and 720 of the California Evidence Code, and Assembly Committee comment to § 405; *e.g., Miller v. Los Angeles County Flood Control District,* 8 Cal.3d 689, 701, 106 Cal.Rptr. 1, 8-9 (1973).) The District Court properly applied the rule for qualification of an expert witness, particularly where (as here) an esoteric area of state statutory law was involved.

Petitioner's argument that he demonstrated Respondent's breach of the standard of care through reliance upon Respondent's own testimony and that of Respondent's expert is entirely unsupported by the record. It is significant, indeed, that neither the Court of Appeals (which reviewed the transcript of the trial court) nor the District Court (which heard and reviewed the testimony of Respondent Mayer and his expert witness) found any evidence that tended to prove the elements of Petitioner's action. (E.g., Petitioner's Appendix A, at 2a; RT 58:1-6.)

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FARELLA, BRAUN & MARTEL

By: DOUGLAS R. YOUNG
Attorneys for Respondent
Marshall S. Mayer

Dated: August 16, 1982.

(Appendix A follows)

Appendix A

Not to be Published in Official Reports

In the Court of Appeal
of the State of California
In and for the Third Appellate District
(Shasta)
3 Civil 17097
(Super. Ct. No. 49628)

Great American Insurance Company, a corporation,
Plaintiff and Respondent,

vs.

Frank R. Sargent,
Defendant and Appellant.

[Filed July 27, 1979]

OPINION

Appellant Frank R. Sargent appeals from a judgment of the Shasta County Superior Court and from an order denying his request for a new trial. Appellant contends that the trial court erred in litigating issues not submitted in violation of a stipulation of the parties, that the litigation of the issues violated his right to a jury trial, that respondent waived contract defenses by filing an action in interpleader, that his counsel was so negligent as to have prevented a trial on the merits, and that the judgment is incorrect. Appellant filed his brief in propria persona wherein he inartfully explains his reasons for objecting to the judgment; however, his brief does disclose his major contention—that the trial court erred in litigating the issue of defenses on a contract of insurance in the context of an

interpleader action. On the facts of this case we agree and reverse the judgment, and remand with directions.

I

In 1972 respondent issued its standard California fire insurance policy covering the building, equipment, stock and inventory of the Casa Blanca motel and restaurant in Redding, California, to appellant and his wife. The Casa Blanca was owned and operated by appellant. The insurance policy contained a standard mortgage endorsement which insured as mortgagees (in order of preference): (1) Gibraltar Savings and Loan Association—$18,386.59; (2) the Corradetti group—$129,906.26; and (3) C. S. and Bhulabhai G. Patel—$87,183.48. In the early morning hours of January 6, 1973, a fire destroyed the restaurant and bar of the Casa Blanca.

Appellant and respondent were unable to agree as to the actual cash value of the property destroyed or the amount of loss. The matter was submitted for an appraisal under the terms of the policy and the appraisal award was subsequently affirmed in court. The amount of the loss was found to be $108,520.00. Counsel stipulated that under the terms of the policy there was payable $71,669.00. Of that sum, respondent had paid $6,484.00 for removal of debris. Respondent then paid Gibraltar $18,386.59 on its note and first trust deed, and in return took an assignment of the note and trust deed. The insurance policy contained a clause providing that in the event the company claims to have defenses on the contract against the owner, it may accept an assignment of the note and trust deed when making payment to the creditor. Appellant then filed suit against respondent on January 4, 1974, in the San Fran-

cisco Superior Court seeking compensatory and punitive damages based upon the policy.

The payment of the amounts for debris removal and on Gibraltar's deed of trust left remaining $46,798.41 of the amount due under the policy. Respondent then filed a complaint in interpleader on July 1, 1974, asserting that it could not safely determine for itself where the remaining proceeds under the policy should be paid and asserting that it claimed no interest in them. Appellant demurred to the complaint in interpleader and the demurrer was overruled by the trial court. Various named defendants, including appellant, then answered the complaint asserting interests in the interpleaded fund. Defendants Corradetti later amended their answer to allege that the sum did not represent the entire balance of the insurance proceeds in that respondent had not satisfied the first deed of trust but had rather purchased the note and deed of trust.

A pretrial conference was held on August 8, 1975. At the conference the question of the Gibraltar note and deed of trust was brought up. Counsel for the junior lien holders wished to reserve their right to challenge the assignment of the Gibraltar deed of trust as taking priority over them. The court was unwilling to proceed on that basis, and suggested that the deed of trust be deposited with the clerk pending its determination of the respondent's right to its assignment. Respondent declined to do this, and the court then ordered that unless respondent agreed to submit that issue to the court the interpleader action would not proceed further. Respondent then consented to the court's suggestion. Throughout the conference the trial court insisted that it would not proceed with the interpleader action without also considering the assignment of the Gibraltar deed of trust to respondent.

In the pretrial conference, concern was expressed by the parties over the effect of the litigation upon other actions. The court insisted that the issue of the Gibraltar deed of trust be litigated, but stated that it did not want to have the determination reached be a bar to issues not actually litigated. The court told appellant's counsel that the issues in the San Francisco action would not be adjudicated in this proceeding unless the pleadings were amended. Throughout the conference respondent maintained that it was entitled to an assignment of the Gibraltar deed of trust, but that it did not care to whom the remainder of the fund went.

Respondent and several of the defendants moved for summary judgments. In its decision on the motions for summary judgment the trial court noted that the Corradetti defendants had foreclosed under their deed of trust and had thereby purchased the property. The court then discussed the motions for summary judgment. It held that respondent was entitled to interplead the amounts previously paid into court ($46,798.41). The court denied respondent's motion for summary judgment as to the effectiveness of the assignment of the Gibraltar deed of trust, and held that that matter must be tried. In so doing, however, the court held that if the assignment was found good against appellant it would be good against the junior lien holders as well. The court stated that the Corradettis would have been entitled to the fund had they not foreclosed their trust deed, but since they had done so they must litigate their entitlement to a deficiency judgment. The court finally ruled that the Patels must litigate their claim, recovering only that to which the Corradettis fail to establish an entitlement.

On May 7, 1976, a supplemental pretrial conference was held. Appellant did not appear. The court ruled that prior to trial of the interpleader action, the nature and extent of any breach of the insurance contract would be tried in order to determine the rights of respondent to take an assignment of the Gibraltar trust deed and note.

On August 11, 1976, appellant filed a "memorandum of points and authorities by defendant Frank R. Sargent re: scope of trial." He reiterated his position that the issues before the San Francisco Superior Court, i.e., defenses of respondent against appellant on the insurance contract, should not be litigated in the Shasta County proceeding. Counsel informed the court of his understanding that the San Francisco issues would not be tried or jeopardized, and sought to have the trial date vacated. The trial court rejected the request and proceeded with the trial.

On December 15, 1976, the court issued its announcement of intended decision. It found that appellant operated the restaurant willfully and knowingly in a manner which increased hazards, that he committed fraud in his proof of loss submitted to respondent, that he failed to safeguard the insured property after the fire, and that he failed to submit to an examination under oath pursuant to provisions of the policy. The court concluded that appellant was in material breach of the policy provisions and that due to such breach he forfeited his rights under the policy to indemnification. Judgment was entered on February 17, 1977. The trial court thereafter denied appellant's motion for a new trial.

II

In order to understand the nature of the proceedings it is necessary to review the contractual and legal basis for respondent's contention that it was entitled to an assignment of the Gibraltar note and trust deed. The ordinary rule is that breach of the contract of insurance by the mortgagor will defeat recovery by the mortgagee. (Ins. Code, § 171; Holbrook v. Baloise Fire Ins. Co. (1897) 117 Cal. 561, 566.) The policy involved in this case specifically provided that the interest of the mortgagees would not be defeated by any act of neglect of the owner or by the use of the property in a manner more hazardous than permitted by the policy. The interest of a mortgagee in the property is a separate insurable interest; the effect of such a clause is that the mortgagee has a separate contract of insurance on his interest. (See Mosee v. Firemen's Ins. Co. of Newark (1927) 87 Cal.App. 473, 475-476.) Thus, although the insurer may have defenses against the owner of the property, it must still stand responsible to the mortgage holder in the event of loss.

In the event of loss, if the insurer should make payments to the mortgage holder and the mortgage be discharged, the owner would be benefited in that his property would no longer be subject to the mortgage. Where the insurer has defenses against the owner of the property, the owner would thereby be unjustly enriched by having the mortgage discharged. In order to prevent this result the Insurance Code provides that an insurance policy may contain a clause providing that the insurer may pay the mortgagee and be subrogated to all his rights of recovery, or it may require an assignment of the mortgage in the event the insurer claims defenses against the owner. (Ins. Code, § 2071.) The contract in question contained such a clause.

When the Casa Blanca was damaged by fire and the amount of the loss and amount payable under the policy had been determined, the company believed it had defenses against Sargent, but such defenses would not be available against the mortgage holders. The amount payable under the policy was more than sufficient to pay off the note and first trust deed held by Gibraltar, and the insurer therefore paid Gibraltar and took an assignment of the note and trust deed. The amount remaining under the policy was of course insufficient to pay the remaining indebtedness secured by the property and insured under the policy, and the company sought to interplead that amount and allow distribution of it to be determined by the court. Respondent repeatedly asserted to the trial court that it was not concerned over which claimant received the remaining funds.[1]

No party to the action disputed respondent's right to make payments on the Gibraltar note and deed of trust. It is clear from the terms of the policy that respondent had the right and duty to make that payment. The Corradettis, however, raised a question concerning the propriety of the assignment of the note and deed of trust when they learned of it. They first amended their answer to state that the fund deposited with the court was not the entire fund and the action should therefore be considered a partial interpleader, and to seek to have respondent discharged only as

---

[1]Code of Civil Procedure section 386 provides for an action in interpleader. At the time respondent filed its complaint it was required to admit that it had no interest in the fund, or at least in a portion of the fund. (Code Civ. Proc., § 386. See also 3 Witkin, Cal. Procedure, pp. 1891-1900.) In 1975, Code of Civil Procedure section 386 was amended to provide that the claims against the party seeking to interplead need not be liquidated and present liability is not required. (Code Civ. Proc., § 386, subd. (b); 3 Witkin, Cal. Procedure (1979 Supp.), § 217, subd. (a).)

to the amount deposited in court and not as to the Gibraltar note and deed of trust. At the pretrial conference the matter was discussed. The Corradettis asserted that the effect of the assignment was as though respondent had purchased the note and deed of trust with its own funds, and that if that was the case then the $18,386.59 paid to Gibraltar could not properly be a credit on the amount of the policy proceeds available to other claimants. Counsel for respondent pointed out to the court that respondent was not claiming an interest in the remaining proceeds of the policy as the holder of a note and first trust deed.

The assignment of the Gibraltar note and first deed of trust to respondent had no effect on the amount of the policy proceeds which respondent sought to interplead. Issues would remain over whether appellant's property was still subject to the deed of trust and if so, whether the deed of trust had priority over the other creditors. Those issues did not affect in any way the fund deposited in court by respondent or the disposition to be made of those funds. The court, however, refused to proceed with the interpleader action unless it was also allowed to consider those issues in a declaratory action. When respondent agreed to submit the issue of the validity of the assignment of the deed of trust new pleadings were not required by the court. The court thus took upon itself to litigate a matter not raised and not affecting the original proceeding without any pleading on the matter and in opposition to the parties' desires.

Code of Civil Procedure section 576 provides that any judge, at any time before or after commencement of trial, in furtherance of justice and upon such terms as may be proper, may allow the amendment of any pleading or pre-

trial order. The allowance of amendments rests in the discretion of the trial court and its determination will not be disturbed unless it clearly appears that such discretion has been abused. (Trafton v. Youngblood (1968) 69 Cal.2d 17, 31.) An abuse of discretion is not shown unless by permitting the amendment new and substantially different issues are introduced into the case or the rights of the adverse party are affected. (*Ibid.*) We note that the trial court herein did not allow amendment to the pleadings or pretrial order *upon request of the parties,* but itself compelled the parties to agree to litigate a distinct action involving distinct issues, as a condition of proceeding on the interpleader action. The court abused its discretion in doing so. Its only proper course was to allocate the interpleaded funds among the claimants to it, after deducting costs and attorney fees for respondent.

The source of the trial court's error is apparent from the judge's comments. Somehow the judge conceived the idea that if the assignment were found invalid under the insurance contract, i.e., if the insurer's claimed defenses on the policy were disallowed, this would generate an additional sum of money ($18,386.59) to be allocated among the interpleaded junior lienholders; none of the attorneys disagreed, at least not persuasively. The fallacy of the trial court's reasoning lies in its misconception of the nature and purpose of the assignment and of Insurance Code section 2071. The existence of defenses on the policy, if established, would normally vitiate the policy and annul the insurer's obligation to pay at all. But as to a third party mortgagee, such defenses are inapplicable, so the third party is paid in spite of them, thus eliminating the risk of foreclosure due to default. But the defenses are no less

valid in such event as against the insured, who is thereby enriched by payoff of his obligation to the mortgagee; to prevent this, section 2071 provides for assignment rather than payoff, thus preserving to the insurer its defenses. If they are ultimately sustained, the insurer may foreclose on the deed of trust or mortgage and thus recoup the money it improperly paid thereon; such money becomes and remains that of the insurer and no one else. If on the other hand the defenses asserted by the insurer are not sustained, the insurer releases the security and does not recoup from its insured and the money earlier paid to the mortgagee stays with the mortgagee. Either way the assignment clause in the policy cannot generate additional funds for junior lienholders, or for the insured; it can only generate reimbursement to the insurer of funds it should not have paid. It is a practical device by which a third party mortgagee is paid promptly, leaving an insurer who asserts policy defenses to litigate them without the threat of foreclosure.

The original complaint was filed in interpleader. The validity of the assignment of the note and the deed of trust from Gibraltar to respondent in no way affected the fund that had been interpled or the parties' right thereto. There is no provision in an interpleader proceeding for the expansion of the proceeding into a general declaratory relief proceeding. (See Code of Civ. Proc., §§ 386-386.6; 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, §§ 216-232, pp. 1891-1907.) The declaratory relief action in this case proceeded at the trial judge's insistence at the pretrial conference, and in the absence of pleadings and pretrial procedure. The matter litigated was an entirely new matter to the complaint in interpleader and as such should have been

subjected to the normal course of pleading. The manifest result of the attempt to proceed in declaratory relief without proper pleadings and pretrial proceedings was extensive confusion among counsel throughout the proceedings concerning the nature of the proceeding and whether their clients would be affected by any ruling. In fact, when the court convened to hear the issue counsel for the other defendants in the interpleader action informed the court that they were not concerned with that issue and absented themselves. There remained only appellant, who had earlier informed the court that he did not contend that the assignment of the deed of trust was invalid. There was thus no one before the court contesting the issue which the court intended to litigate, yet the court went forward and tried the issue. It is settled that courts should not render purely advisory opinions, and in the context of the interpleader action the findings of the court relative to appellant's breach of the insurance contract were not at issue. (Younger v. Superior Court (1978) 21 Cal.3d 102, 119-120.) The court thus abused its discretion in trying the issue.

Despite the foregoing, the Corradettis and the Patels did not appeal and appellant's appeal does not contest the court's judgment and findings relative to the interpleader action. Appellant's sole complaint is that the findings of the trial court might be asserted as res judicata or collateral estoppel in his San Francisco action. The judgment herein does not make reference to a breach of the insurance contract by appellant; however, the findings of fact and conclusions of law do state that he did so. We deem those findings irrelevant to the interpleader action. The error may

be corrected by striking from the findings and conclusions any reference to the alleged breach of contract.[2]

The judgment is remanded with directions to enter new findings of fact and conclusions of law and a judgment in conformity with the views expressed herein. Otherwise it is affirmed. Appellant shall recover costs on appeal.

/s/ Reynoso, J.

We concur:

Paras, Acting P.J.

Evans, J.

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[2]Appellant requests findings of fact on appeal. California Rules of Court, rule 23 (a) provides for the request of a party for findings of fact on appeal. In view of the result reached it is unnecessary to consider appellant's remaining contentions; thus, findings of fact on those contentions are not necessary.